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Moroni F. Bott v. A. M. Reeder dba Adolph M. Reeder and Ada M. Reeder : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

MORONI F. BOTT,
Plaintiff-Respondent,

vs.

A. M. REEDER, aka, ADOLPH M. REEDER, and wife, ADA M. REEDER,
Defendants-Appellants.

Case No. 9539

RESPONDENT'S BRIEF

Appeal from the Judgment of the 1st District Court for Cache County

Hon. Lewis Jones, Judge

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ADDITIONAL STATEMENT OF FACTS

Somehow or other it appears that the record on appeal and the transcript are separated, and thus references herein will appear as follows: (R) will refer to the lower court's clerk numbering of the Record, and (Tr.) will refer to the pages of the court reporter's page numbering. The word "files" refer to the entire record on appeal.

It seems that this case involves more of a factual situation as found by the lower court, than one involving questions of law.

The files show that the last day in court in this matter occurred on July 11ht, 1961 (Tr. 60). Counsel will no doubt admit, even though the following events do not appear in the files, that on the next day, July 12th a

cashier's check for the sum of $2,621.58 was drawn to the order of the Clerk of the District Court at Brigham City, in final payment of the purchase price of the property in question. Mr. Reeder or his counsel accepted the check and delivered a warranty deed in favor of plaintiff, which deed was delivered to the clerk of court. Mr. Reeder obtained from the clerk the cashier's check, and Mr. Bott received from the clerk the Reeder warranty deed.

It appears from the files that there was misapprehension in the lower court's mind concerning the matter of interest, for he says: (Tr. 60-61) "I've had the reporter check the record and the court is about to eat crow. I want to say in the record that Mr. Reeder in his testimony stated that he wanted no more than the amount due, and the reporter couldn't find anything in the record to show me that Reeder had ever gone to Bott and talked to him about an extension of time or stated that because of Mr. Mason that he couldn't get the title quieted, and the record seems to be silent as far at Bott is concerned. There was never anything said. So I subscribe to the doctrine of law that you presented, Miss Hansen, but I can't find the facts to justify it. I'll announce that's the law, but there had to be something happen there, and neither Reeder nor Bott testified to anything. Now if there is anything, you point it out."

It should be born in mind at the time of this writing,

that Mr. Reeder has not yet cleared the title to the property.

Turning again to the files (Tr. 62) and quoting from one of the attorneys (Miss Hansen) for appellant: "We admit he (Mr. Reeder) testified at the time that THEY AGREED THERE WOULD BE NO INTEREST. WE'-LL EVEN ADMIT TO A FINDING FACT." (mine).

In pursuance to this statement Miss Hansen presented to the court (R. 81) a proposed finding No. 5 as follows:

> "5. That at the time the Defendants delivered to the plaintiff the said Memorandum of Sale it was agreed by the Defendants that there would be no interest charged on the sale price until ninety days after tender of a deed by Defendants."

The court made its finding No. 5 (R. 86) as follows:

> "That at the time of the conclusion of the trial of said matter, and up to and including the 27th day of June, 1961, at 12:00 o'clock noon, no such tender of such deed had been made by the said A. M. Reeder to the Plaintiff".

Then the court made a finding as to interest:

> (R. 76) " . . . and that the parties further agreed that the purchase price should bear no interest, and that until the expiration of ninety days after the said A. M. Reeder had tendered to Plaintiff a Warranty Deed to such premises, and that after such a ninety day period, the balance of such purchase should bear interest in favor of the said A. M. Reeder at the rate of four (4%) per

> cent per annum until payment of the full purchase price."

Let us now look into the record about this matter of interest. On cross examination by Mr. Hansen (witness —Moroni R. Bott, father of plaintiff) stated (Tr. 30-31):

> "Q. You say this last time that the agreement then was that there was to be no interest or rent. Was there another time, another meeting when the parties — A. We went from the courtroom (referring to some previous trial) here over to George Mason's office and that's where I delivered the check to George Mason, and Dolph (Mr. A. M. Reeder) and George agreed both that they should be no interest or rent at that time until - - Q. Do you remember the conversation that took place?
>
> A. That Dolph didn't want any interest mentioned or something because - - - Q. Well, would you just answer my question? Do you remember what conversation took place, Mr. Bott? A. Yes, I remember it. Q. And do you remember who said what? A. Well, George said there would be no interest and no rent, and Dolph (Mr. A. M. Reeder) did too.

There was some good reason for this question of "interest" that had a bearing on the closing or administration of an estate that Attorney George Mason was handling. Frankly, the real situation does not appear in the files, but it seems to stem from some settlement of an estate in the name of "Holly". This appears on page 31 of the transcript, where the following took place:

(Cross X — Moroni Bott senior) Q. Was there any conversation by Mr. Reeder? Did he say anything? A. Well, he mentioned at that time he didn't want any interest on the whole thing or something. Q. Who did he mention that to? A. The four or five of us were there together and his first wife (Mr. Bott Jr.) was there. Q. You say you mentioned it to George Mason. A. Yes. Q. Well, wasn't George Mason the one that would be charging him interest on the property if it was brought up? A. We agreed there would be no interest".

Again, let us find upon what ground the court below made its finding as to the matter of interest:

(Tr. 33-34) "Q. (cross examination by Mr. Hansen) Now, what did he say about rent and interest? (refering to defendant, Mr. Reeder) A. Well, he said there would be no rent or interest until he could deliver the title."

The court below comments in his oral statement:

(Tr. 41) "Now as a corollary to that, I find that the parties agreed that there was to be no intest until ninety days after Mr. Reeder tendered the deed. Now I can't draw any other conclusion. Mr. Reeder was honest enough to take the stand and say it was about as testified, and I take it that's what he meant."

STATEMENT OF POINT

That the lower court did not err in finding and holding that defendants were not entitled to interest until the expiration 90 days from date of tender of deed.

ARGUMENT

The most apt language the writer has found is contained in the New Mexico case of City v. Southwestern Public Service Co., 161 P. 878 (at p. 884, lower right column):

> "The parties either did or did not agree that the deferred balance of $130,000 was to be without interest. The trial court found there was an agreement not to pay interest based upon the intention of the parties at the time the contract was signed. The finding cannot be said to be without support in the evidence. The stipulation in the electric franchise ordinance that the installment payments were to be 'without interest' unquestionably evidences this agreement and intent."

Opposing counsel cite only one Utah case in support of their position — Farnsworth vs. Jensen (p. 12 of the brief) —and this case is not in point because of the recitation of facts by the Court: (p. 572, lower right column).

> "The contract and note both provided that the yearly payments were to include interest on the deferred balance at the rate of six per cent per annum."

It should be remembered that the written agreement, Ex. P. 1 (R. 75) is dated August 31, 1943, and that in the same year plaintiff applied to Mr. Christensen of Beneficial Life Insurance (Tr. 35-36) to secure a loan on the property in payment of the purchase price, the application for which loan was not approved because

Mr. Reeder's title to the property to be conveyed, was not marketable.

Appellants and their attorneys agree with the position of respondent, with the findings and conclusions, and the decree of the lower court, as set out on pages 2 and 3 of their brief:

> "It was further agreed by the parties at the time Mr. Reeder delivered the memorandum to the Plaintiff that interest was not to be charged, according to Plaintiff's witness, until 90 days after tender of the deed." And,
>
> "Defendents (p. 3) have no argument with either finding (1) that Reeder was to give, in effect a warranty deed when he obtained a good title from Holleys, and (2) that the parties agreed there was to be no interest until ninety days after Mr. Reeder tendered the deed."

Mr. Reeder apparently agreed with the version of plaintiffs. (Tr. 14) "Q. When was he to pay you the $4,000? A. Well, when we got the deed with title. Q. And he hasn't got it yet? A. No. Q. So that the $4,000 isn't due until you deliver him title? A. That's right."

Further (Tr. 39) "Q. Well, can you tell us what was said by you and what was said by the other parties there at the time? A. Well, it's been stated, and that is about right. A. I have no fault with the statements."

As late as two years prior to the trial Mr. Reeder had prepared a final written agreement concerning the same land, which was not signed by the parties, but

which (Ex. 2) (Tr. 25) made no provision for interest. (Note: through some oversight the exhibits were not included in the record, and thus I am calling on my recollection and the Transcript — I will secure an order, if possible, to have the exhibits forwarded for inclusion in the record under 75 (h) of the Rules.

Under any conceivable theory of this case, all defendants had to do to commence the running of interest, was to tender a deed to Mr. Bott, which he did not accomplish until forced to do so by an action for specific performance.

Opposing counsel refer to the equities of the case, apparently without considering the facts of the agreement. This Court said in Salina Canyon Coal Co. v. Klemm, 76 Utah 372, 290 P. 161:

> "For the court to hold that Lehman or his company is entitled to interest for more than eight years would be converting a perverted trust into a profitable investment for an unfaithful trustee at the expense of the beneficiary."

The logic of that case, when applied to our case, (without regard to the agreement of the parties as to nonpayment of interest) is that Mr. Reeder should not be put in a position where can compel Bott to pay him interest by his own failure to tender a deed until forced to do so by court order.

It is well to point out here that appellant mentions

the fact, several times, that Reeder could not give a deed, because he *did not have title.* This could be misleading, because what the parties were referring to was the fact that there was some kind of a cloud on the title, that Reeder was trying to remove by an action to clear the title (Tr. 17 thru 20). Reeder is still, at this time, so far as known, trying to get his attorneys, to clear the same title. Thus, he was in just as good a position to deliver a deed in 1943, as he was at the conclusion of the trial.

It is significant to here point out that in defendants' Amended Answer and Counterclaim (R. 71 to 73) they deny that the parties entered into a written contract, admit the execution of Ex. P-1, and then (R. 73) affirmatively allege that the parties entered into an oral contract on August 31, 1943. Then in their proposed findings (R. 80) they set up verbatim, the written contract (Ex. P-1). Unless the writer has overlooked some evidence there is not one word indicating an obligation to pay interest, other than as found by the court below that the purchase price was payable within 90 days after delivery of the deed, and that thereafter, if default be made by plaintiff (and no default appears), he was to pay interest at 4%.

The writer is omitting the citation of cases where there is a specific agreement, either oral or written, to pay interest.

Counsel for defendants in their brief seem to complain about the matter of some statements made by the lower court (Appellants brief, p. 3, 4 and 5) being inconsistant with the final findings and decree. Hurriedly we point to the case of Williams v. Kinsey, 169 P. 2d 487 (Cal.).

> "It is settled that inconsistencies between the written or oral opinion of a trial judge or his antecedent expressions and the findings of fact cannot be considered by an appellate court."

Counsel point on page 6 of their brief:

> "It is important to note that while the parties agreed that interest was not to be charged until after tender of the deed, there was no contract, or agreement, either written or oral, which specified there would be no interest charged regardless of any contingencies that might arise."

The writer does not find one word in the evidence as to the cause of the 17 year delay in clearing title—the time is now going on to 19 years There is no explanation. The only certanity is that this long delay was through no fault of Mr. Bott. Thus, we have nothing before this Court that could bring any of the equities into play as contended by opposing counsel.

The case of Petty v. Clark, 113 Utah 205, 192 P. 2d 589 was mainly a case involving the fact as to whether an interest provision in a contract had been "Xed" out, but the contract did provide for a 40 day grace period in the payments under the agreement. Since the lower

court in our case found as a fact, and admitted by defendants, that the agreement was that the purchase price should draw interest only if the same be not paid within 90 days after delivery of the deed, the Petty case on the matter of interest is in point:

> "The interest provision of this contract provides that the defendant 'shall have forty days grace on any payment, and the past due payments shall bear interest at the rate of 1 per cent per month until paid.' Since the grace period is provided for as part of the interest provision we conclude that the parties intended that the interest should not commence to run on any installment or unpaid part thereof until after the expiration of this forty day grace period and then only on the unpaid balance until paid, and that no interest shall be paid on interest."

Defendants call upon principles of equity to aid them in their claim. It is so, that equity may in certain cases reform a contract to correctly express the agreement and intention of the parties. But, it is doubted that equity has ever reformed an agreement or contract contrary to the intention and agreement of the parties. Neither has equity ever made an agreement for the parties. They must make their own agreement. Reference is again made to the cross examination by Mr. Hansen (Tr. 33):

> "What did he (Reeder) say about *rent and interest?* (mine) A. Well, he said there would be no rent or interest until he could deliver the title".

In conclusion, the writer stresses the fact that cases

dealing with the matter of interest, the payment of which is provided for in the agreement itself, are intentionally omitted herefrom, as not in point and would unduly lengthen this brief.

Respectfully submitted.

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